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No. 89-333

In The

Supreme Court of the United States

October Term, 1989

STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF IDAHO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA AND WYOMING IN SUPPORT OF PETITIONER

THE HONORABLE JIM JONES
Attorney General
State of Idaho

CLIVE J. STRONG*
Deputy Attorney General
Chief, Natural Resources Division
Statehouse, Room 210
Boise, Idaho 83720
(208) 334-2400

*Counsel of Record

(Additional counsel listed on inside cover.)

BEST AVAILABLE COPY

Honorable Don Siegelman
Attorney General
State of Alabama

Honorable Douglas B. Baily
Attorney General
State of Alaska

Honorable Robert K. Corbin
Attorney General
State of Arizona

Honorable Steve Clark
Attorney General
State of Arkansas

Honorable Duane Woodard
Attorney General
State of Colorado

Honorable Clarine Nardi
Riddle
Attorney General
State of Connecticut

Honorable Charles M.
Oberly III
Attorney General
State of Delaware

Honorable Michael J. Bowers
Attorney General
State of Georgia

Honorable Robert A.
Butterworth
Attorney General
State of Florida

Honorable Warren Price III
Attorney General
State of Hawaii

Honorable Neil F. Hartigan
Attorney General
State of Illinois

Honorable Linley E. Pearson
Attorney General
State of Indiana

Honorable Tom Miller
Attorney General
State of Iowa

Honorable Robert T. Stephan
Attorney General
State of Kansas

Honorable Frederic J. Cowan
Attorney General
State of Kentucky

Honorable James E. Tierney
Attorney General
State of Maine

Honorable James M. Shannon
Attorney General
State of Massachusetts

Honorable Frank J. Kelley
Attorney General
State of Michigan

Honorable Hubert H.
Humphrey III
Attorney General
State of Minnesota

Honorable Mike Moore
Attorney General
State of Mississippi

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Honorable William L. Webster
Attorney General
State of Missouri

Honorable Marc Racicot
Attorney General
State of Montana

Honorable Robert M. Spire
Attorney General
State of Nebraska

Honorable Brian McKay
Attorney General
State of Nevada

Honorable John P. Arnold
Attorney General
State of New Hampshire

Honorable Peter N. Perretti Jr.
Attorney General
State of New Jersey

Honorable Hal Stratton
Attorney General
State of New Mexico

Honorable Lacy H. Thornburg
Attorney General
State of North Carolina

Honorable Nicholas Spaeth
Attorney General
State of North Dakota

Honorable Robert H. Henry
Attorney General
State of Oklahoma

Honorable Dave Frohnmayer
Attorney General
State of Oregon

Honorable Ernest D. Preate Jr.
Attorney General
State of Pennsylvania

Honorable James E. O'Neil
Attorney General
State of Rhode Island

Honorable T. Travis Medlock
Attorney General
State of South Carolina

Honorable Roger A. Tellinghuisen
Attorney General
State of South Dakota

Honorable Charles W. Burson
Attorney General
State of Tennessee

Honorable Jim Mattox
Attorney General
State of Texas

Honorable Paul Van Dam
Attorney General
State of Utah

Honorable Jeffrey L. Amestoy
Attorney General
State of Vermont

Honorable Kenneth O. Eikenberry
Attorney General
State of Washington

Honorable Roger Tompkins
Attorney General
State of West Virginia

Honorable Joseph B. Meyer
Attorney General
State of Wyoming

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INTEREST OF AMICI CURIAE

Under the Equal Footing Doctrine, the states acquired sovereign ownership and control of all navigable waters within their borders, subject only to the federal constitutional powers to regulate commerce and administer federal lands. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842). These sovereign state powers include the right to adopt state laws that provide for the allocation of water among competing users. *United States v. Rio Grande Dam and Irrigation District*, 174 U.S. 690, 702-703, 709 (1899).

Over time, the states have used their sovereign power over water to develop sophisticated management systems to control the distribution and use of water. Each state system is tailored to reflect local water availability and needs. In recognition of this fact, Congress has consistently and purposefully deferred to the primacy of state law in federal enactments affecting water allocation. *California v. United States*, 438 U.S. 645, 653 (1978).

The Federal Energy Regulatory Commission (hereinafter FERC or Commission), in its Order in Response to Request for Declaratory Order ("Rock Creek Order"), 38 FERC § 61,240 (March 11, 1987), and in its Order Denying Rehearing, 41 FERC § 61,198 (November 20, 1987), asserts that Congress intended to depart from its historical deference to state water law when it enacted the Federal Water Power Act of 1920.[1] FERC argues that it has been granted,

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[1] The Federal Water Power Act was subsequently incorporated in the Federal Power Act of 1935, 16 U.S.C. §791(a)-793, 795-818, 820-825(r) (1982 & Supp. 1986). These two acts will be collectively referred to as the "FPA".

under the FPA, exclusive jurisdiction over all aspects of private hydropower projects licensed under the FPA, including the setting of water flow rates at those projects. The United States Ninth Circuit Court of Appeals affirmed FERC's finding that the agency has exclusive control over the setting of water flows for hydroelectric power projects. 877 F.2d 743 (9th Cir. 1989).

The FERC orders and the affirming decision of the Ninth Circuit ignore both the express language of the FPA and the legislative history confirming Congress' intent to defer to state laws controlling water rights. The Ninth Circuit's decision enthrones FERC as the supreme authority over decisions related to control, appropriation and use of water at hydropower projects, a role never intended by Congress.

If the decision of the Ninth Circuit is allowed to stand, it will fundamentally alter state control of water resources and will eviscerate comprehensive state regulatory systems for allocating water. FERC's power over state water resources will come to supersede all state authority to regulate state water rights. Thus, the 43 Amici Curiae states have a significant interest in supporting California's petition and ask that the Court accept the case and reverse the lower court's decision.

ARGUMENT

I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS RAISES AN IMPORTANT FEDERAL QUESTION.

The decision of the United States Ninth Circuit Court of Appeals in *California v. FERC* raises an important question of federal law which has not been, but should be,

settled by this Court. Sup. Ct. R. 17.1(c). The Ninth Circuit's interpretation of section 27 of the FPA ignores Congress' express intent to defer to state water law, thus dramatically altering the respective roles of the states and federal government in regulating private hydropower development.

The federal policy of deferring to state water law originated from the constitutionally-based equal footing doctrine. *California v. United States*, 438 U.S. 645, 654-55 (1978). Under the equal footing doctrine, the original thirteen states retained sovereign control over their navigable waters subject only to the federal power to regulate commerce and to protect federal reservations. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 709 (1899). States subsequently admitted to the union acquired the same sovereign power over their navigable waters.

In keeping with the equal footing doctrine, Congress for over 200 years has refrained from impinging upon the states' authority to regulate water. As this Court noted in *California v. United States*, 438 U.S 645 (1978), Congress has continually opted for state regulation. "The history of the relationship between the Federal Government and the States in the reclamation of arid lands of Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *Id.* at 653.

Congress has routinely expressed its policy of deference to state water laws in statutes that touch upon the regulation of water. Public lands acts of the 1800's, for example, expressly deferred to state regulation of water

rights. *See* Mining Act of 1866, 14 Stat. 253, 43 U.S.C. § 661 (1982), and the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 (1982). Similarly, the Reclamation Act of 1902, 32 Stat. 388, 43 U.S.C. § 371 *et seq.* (1982), expressly required federal reclamation projects to comply with state water laws. Section 8 of the Act states:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the water thereof.

43 U.S.C. § 383.

Congress intended to carry this policy of express deference to state water law through to the Federal Water Power Act of 1920. Section 27 of the Act was taken almost verbatim from section 8 of the Reclamation Act of 1902:

> Nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

16 U.S.C. § 821. By its terms, section 27 recognizes a broad array of state regulation of water rights: control, appropriation, use, and distribution. It is hard to imagine a plainer expression of Congress' intent to defer to the regulatory authority of the states.

Despite Congress' express intent, the Ninth Circuit chose to narrowly read section 27 as limiting "state authority to the area of property rights involving water for irrigation, municipal use, and related activities." 877 F.2d at 747. Not only is such an interpretation unsupported on the face of the statute, it is contrary to general principles of preemption and of statutory interpretation. This misinterpretation of the FPA presents a significant federal question warranting review.

II. THE EXPRESS LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 27 OF THE FPA PRECLUDES PREEMPTION OF STATE AUTHORITY TO REGULATE WATER RIGHTS FOR PRIVATE HYDROPOWER PROJECTS LICENSED UNDER THE ACT.

A. The Ninth Circuit's Preemption Analysis Was Inappropriate.

"When Congress legislates in a field traditionally occupied by the states," preemption analysis must start "with the assumption that the historic police powers of the states [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *California v. ARC America Corp.*, 490 U.S. ___, 109 S. Ct. 1661, 1665, 104 L.Ed.2d 86, 94 (1989). Since regulation of water is a field traditionally occupied by the states and since Congress deliberately and purposefully included a savings clause for state water law in the FPA, a fortiori there can be no clear and manifest intent to preempt state water law. Indeed, section 27 of the FPA gives rise to the opposite conclusion. As Justice Scalia stated in his concurring opinion in *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 295 (1987), a savings clause is best viewed as an "anti-preemption" provision.

When Congress enacts an anti-preemption provision, the proper inquiry irrespective of the pervasiveness of the federal statutory scheme, is to construe the statutory provision. *See Id.* at 296; *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355 (1986); *See also* L. Tribe, *American Constitutional Law*, 482-83, n.8 (2d Ed. 1988). Thus, the Ninth Circuit should have construed the language of section 27 rather than engaging in preemption analysis.

B. Statutory Construction of Section 27 Demonstrates That Congress Intended to Defer to State Water Laws.

Proper analysis of an anti-preemption clause must begin with ordinary canons of statutory construction. A well-established rule of statutory interpretation obliges a court to give effect, if possible, to every word or clause Congress used. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). The Ninth Circuit interpretation that section 27 defers solely to proprietary rights under state law fails to give effect to the clause of section 27 deferring to the states' regulatory authority, thus violating this fundamental canon of construction.

If Congress had intended to limit section 27 to proprietary rights, it would have been sufficient to simply disclaim any intent to interfere with vested water rights. Instead, Congress expressly deferred to state laws "relating to the control, appropriation, use, or distribution of water . . . *or* any vested right acquired therein." The sentence contains two clauses referring to separate aspects of state water law, connected by the disjunctive

"or." The first clause refers to state laws regulating "control, appropriation, use or distribution of water." These are well-established terms of art relating to state regulation of water rights. The second clause refers to state laws vesting water users with a protectable property interest. The Ninth Circuit, by interpreting section 27 to protect only vested property interests, rendered the first clause of the sentence a nullity.

Another canon of construction is that terms connected by a disjunctive should be given separate meanings, unless the context dictates otherwise. *Reiter v. Sonotone Corp.*, 442 U.S. at 339. Thus, the second clause recognizing vested property rights cannot be properly read to modify the first clause deferring to state laws relating to the control, appropriation, use or distribution of water. A proper construction of section 27 is that the disjunctive "or" between the two phrases is intended to preserve both aspects of state law. A review of the legislative history confirms this interpretation.

C. Legislative History of Section 27 Demonstrates That Congress Intended to Defer to State Water Laws.

Congress debated the subject of hydropower legislation during several sessions, beginning in 1914 and ending with enactment of the FPA in 1920. The congressional debates demonstrate that Congress did not intend to preempt state water laws, but instead, specifically provided for their application.

The predecessor of section 27 is contained in section 14 of H.R. 16673, a hydropower bill introduced in 1914.[2] Congressman Edward Taylor of Colorado, who authored section 14, which is virtually identical to section 27 of the FPA, stated that:

> A power company [under section 14] must come in and put itself on the same footing and equality with other appropriators of water and make an appropriation under our laws so that those that are ahead will be ahead of water-power companies authorized under this act; and those who are behind will be behind the new power company; in other words, *they will have to come in on an equality with all other water users and acquire and use their water rights under our State water-right laws* and under the acts of Congress and laws by which those rights were acquired.

51 Cong. Rec. 14071 (1914) (emphasis added).

When Congress resumed the debate over hydropower development in the sixty-third Congress, a new hydropower development bill was introduced. This bill also contained language similar to section 8: "[N]othing in this act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water." S. Rep. No. 66, 64th Cong., 1st Sess. 3 (1916). The Senate Committee on Public Lands expressed its intent regarding this language:

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[2] Section 14 provided: "That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder." H.R. Rep. No. 842, 63d Cong., 2d Sess. 4 (1914).

> This bill in no way seeks to encroach upon, impair, or destroy any rights of the States. It is not intended in any wise or in any degree to trench upon the right of the State to control of the water flowing in the streams within its borders. *It is framed upon the distinct theory that the State owns and controls the use of the water flowing within the streams within its boundaries, and that the Federal Government owns and has the right to control and dispose of the public land bordering on and adjacent to such streams.*

Id. at 4-5 (emphasis added). The Committee's report concluded:

> *[T]he States alone cannot facilitate water-power development nor provide legislation sufficient therefor, because the States control only the water.* It takes land as well as water in such cases to develop power. On the other hand, *the Federal Government alone cannot furnish the facilities for the development of power, for the Federal Government owns only the land,* and it takes water as well as land to develop power. *Each must contribute its share. The Federal Government must contribute the use of land, and the State government must contribute the use of water. . . .*

Id. at 5 (emphasis added). Thus, the Senate report made clear that, although the federal government controls the land for hydropower projects, the states control the water rights. Once again, however, the Congress failed to pass a hydropower development act.

In December, 1918, President Woodrow Wilson attempted to break the deadlock over hydropower legislation. His efforts resulted in the introduction of S. 1419, which contained two provisions, sections 9(b) and 27, virtually identical to the savings provisions now contained in the FPA. H.R. Rep. No. 715, 65th Cong., 2d Sess. 6, 13 (1918).

The congressional floor debates relating to S. 1419 demonstrate that Congress intended to make state water laws applicable to hydropower projects. Congressman William La Follette, a leading member of the joint committee formed to conduct hearings on the bill, argued that the bill continued the congressional policy of deference to state water laws. 56 Cong. Rec. 9108-9113 (1918). La Follette, citing the Supreme Court's decisions in *Martin v. Waddell's Lessee, supra, Pollard v. Hagan*, 44 U.S. (3 Howard) 212 (1845), and *Kansas v. Colorado*, 206 U.S. 46 (1907), stated that these decisions sustain "the States' sovereignty and right of control of the water, beds and banks of navigable and nonnavigable" waters, and indicate that the federal government does not have "any proprietary rights" to the water. 56 Cong. Rec. 9109 (1918). La Follette declared that the bill was intended to overcome the "divided authority" that prevented hydropower development, stating that:

> [M]any power possibilities would have long ago been developed and be giving service to man if it were not for a divided authority. *While the right of water control and the ownership and jurisdiction of bed and banks of our watercourses are admittedly in the States,* the jurisdiction over the navigation of all streams being in the Government the States could not well pass laws conferring upon private individuals' rights to build dams across the streams, because the Government could intervene and stop proceedings under the plea of control of navigation.

Id. (emphasis added). Thus, La Follette argued that "divided authority" was impeding hydropower development because the federal government was not making lands available for hydropower projects, even where state law granted water rights to such projects. The solution,

he argued, was to reverse federal policy by making lands available for hydropower projects that acquired water rights under state law.[3]

Other congressmen argued in the same vein. Congressman Frank Mondell stated that:

> The waters belong to the people of the States and the only property that the Federal Government has is land. . . . *The bill . . . expressly disavows any intent or purpose of taking over control of the waters from the States.*

56 Cong. Rec. 9113, 9114 (1918) (remarks of Rep. Mondell) (emphasis added). Congressman Frank Doremus stated that "water-power companies organized under this act will be obliged to operate under the laws of the various States." *Id.* at 9768. Congressman John Raker reaffirmed that the federal licensee "gets its rights by applying to the State for it. . . ." *Id.* at 9902. Senator Henry Myers stated that:

> I believe that it is the intention of the bill, as it was of bills that emanated in times past from the Public Lands Committee of the Senate, merely to control, regulate, and dispose of the use of public lands through which the water flows. *It is not intended to interfere with the ownership and control by the State of those waters.*
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> . . .

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[3] Curiously, the Supreme Court, in *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946), cited La Follette's "divided authority" statement for its dictum that Congress meant to preempt state water laws. The full statement cited above makes clear that La Follette argued in favor of removing federal obstacles, not in favor of preempting state laws.

> *The State controls the use of the water, the Federal Government controls the use of the public land through which the water flows. The consent of each must be obtained.*

Id. at 10494 (emphasis added).

Both the House and Senate passed different versions of S. 1419, and the differences were resolved in a conference bill. The House approved the conference bill, but the Senate failed to approve the bill before the end of the session. In the following session, in 1920, Congress enacted, and President Wilson signed, H.R. 3184, which was identical to S. 1419. H.R. Rep. No. 61, 66th Cong., 1st Sess. 1 (1919).

The legislative history of the FPA demonstrates unequivocally that Congress only intended to remove federal obstacles to hydropower development, not to preempt state water laws. Congress, assuming that the federal government owned the public lands and that the states owned the water, intended to enact a dual system of control that provided a means for hydropower developers to gain access to federal lands without diminishing the states' authority to regulate water. Congress' intent to continue its historic policy of deferring to state water laws could not be more clearly stated.

III. RELEVANT JUDICIAL DECISIONS DO NOT SUPPORT THE NINTH CIRCUIT COURT OF APPEALS DECISION.

A. *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n* Does Not Support The Ninth Circuit Court of Appeals Ruling.

The Ninth Circuit decision interprets *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328

U.S. 152 (1946), as a direct holding by this Court that section 27 protects only proprietary rights. The precise scope of section 27, however, was not at issue in *First Iowa*. The question presented in *First Iowa* was whether section 9(b) of the FPA, requiring "substantial evidence" of compliance with state laws prior to issuance of a hydropower license, required the applicant to obtain the permits required under state law for construction and operation of a hydropower facility.[4] The *First Iowa* decision did not concern, as does the present case, the issue of appropriation, control, use or distribution of water that section 27 recognizes as being subject to state law.

The Court itself recognized the distinction between its holding based on section 9(b) and its dictum regarding section 27: "[t]he directness and clarity of section 27 as a 'savings' clause and its location near the end of the Act emphasized the distinction between its purpose and that of section 9(b). . . ." (Footnote omitted.) *First Iowa*, 328 U.S at 175. The Court went on to state that section 9(b), by calling for evidence of compliance with state laws, did not establish a substantive policy such as that contained in section 27. *Id.* at 177.

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[4] Section 9(b) requires the applicant to submit:

> [s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to beds and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act. 16 U.S.C. § 802(b).

In sum, the Court's holding in *First Iowa* that section 9(b) did not require compliance with state laws is not applicable to the broader and more fundamental question of the substantive policy created by Congress in section 27. As demonstrated in the previous section, proper preemption analysis requires that the Congressional intent to preserve state water law be given effect. Thus, the reliance by the Ninth Circuit in the present case on the *First Iowa* dicta concerning section 27 is misplaced.[5]

B. The Ninth Circuit Decision Conflicts With *California v. United States*.

While the savings clause in the FPA has not been directly interpreted by this Court, section 8 of the Reclamation Act of 1902, the clause that section 27 was patterned after, was interpreted by this Court in *California v. United States*.[6] The Supreme Court's interpretation of section 8 of the Reclamation Act is markedly different than the Ninth Circuit's interpretation of section 27 of the FPA.

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[5] Dicta is not controlling when an issue is squarely presented to this Court for decision. *Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 319 n.9 (1977). Thus, any interpretation by this Court of section 27 does not implicate the principles of stare decisis.

[6] Congressional history attests that the savings clause in section 27 of the FPA was directly patterned after section 8 of the Reclamation Act. Congressman Taylor expressly so stated: "I took this language of section 14 [predecessor to section 27] from section 8 of the reclamation bill and inserted it in this bill." 51 Cong. Rec. 14067 (1914). Throughout all of the hearings and debates this fact was repeatedly emphasized by those sponsoring the bill. See 51 Cong. Rec. 13630-31, 14067-68, 14070-72, 14139 (1914); 53 Cong. Rec. 740 (1916), 56 Cong. Rec. 9902, 9113-10494 (1918).

In *California*, the State of California Water Resources Control Board imposed twenty-five conditions on the Bureau of Reclamation's New Melones Project. The Ninth Circuit held that the substantive provisions of state water law were preempted by the Reclamation Act. This Court reversed the Ninth Circuit's holding, instead giving full recognition to the state's right to control the appropriation and use of water involved in a federal reclamation project. The Court held that Congress intended, in the Reclamation Act, "to defer to the substance, as well as the form, of state water law." *California*, 438 U.S. at 675. The Court further stated that to follow the government's interpretation of the Act "would trivialize the broad language and purpose of [section] 8." *Id.* In reversing the Ninth Circuit, this Court assumed that states retained exclusive control over their unappropriated waters.

The Court in *California* expressly rejected dicta in two earlier cases, *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 291-292 (1958) and *City of Fresno v. California*, 372 U.S. 627, 630-631 (1963), that limited the scope of section 8 to protection of the proprietary aspects of state water laws, and denied extension to regulatory aspects of state water laws. Specifically overturning its prior decisions in regard to this interpretation, the Court concluded that section 8 required compliance with the substantive as well as proprietary aspects of state law.

Since *California* disavowed the dicta in *Ivanhoe* and *City of Fresno* restricting the scope of section 8 to proprietary aspects of state water laws, the dictum in *First Iowa* similarly restricting the scope of section 27 of the FPA cannot stand. Although the Ninth Circuit attempts to reconcile its decision with *California* by distinguishing the two Acts, this is a distinction without a difference. The

nearly identical clauses of the Reclamation Act and the FPA do not support incongruent interpretations. In general, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense. *Marks v. United States*, 161 U.S. 297, 302 (1896); 2A Sutherland, *Statutory Construction*, §§ 51.02-03 (4th Ed.). In fact, the Court in *First Iowa* specifically noted that section 27 "carries the established meaning of the language [of section 8] into the Federal Power Act. . . ." 328 U.S. at 177 n.20. Thus, if the Ninth Circuit's decision is allowed to stand, a divergence in federal law will occur where state law will apply to federal reclamation projects but not to private hydropower projects.

IV. THE NINTH CIRCUIT DECISION COMPLETELY UNDERMINES COMPREHENSIVE STATE ADMINISTRATION OF WATER RIGHTS

Each state has developed a single comprehensive regulatory scheme for allocating its waters. This is not a mere coincidence but rather a practical necessity, because water is an essential, nonsubstitutable commodity. Its availability, in large part, dictates a state's economic and environmental future. If private rights to use of the water were unregulated, each person would be driven to maximize his present use before others acting in a similar manner deplete the resource. This would lead to a tragedy of the commons[7] and would subject water policy to

[7] Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968). Hardin wrote that a tragedy of the commons occurs when uncontrolled personal rights exist in a shared natural resource. When this occurs, it is not in the best interest of anyone to conserve the resource because conservation merely makes more of the resource available for other users.

the whims of private interest. A single comprehensive water regulatory scheme is the best means of avoiding this tragic outcome.

Each state's comprehensive water law system has evolved in response to the physiographic, hydrologic and climatic conditions of the individual state. In the arid West, states follow some form of the prior appropriation doctrine. In the East, most states follow some form of the common law riparian doctrine. Although the two systems of administration are radically different, each is designed to achieve the same purposes. First, they establish a system for fairly allocating the available water supplies. Second, the systems ensure a predictable water supply for individual water users. The Ninth Circuit decision completely undermines both of these purposes and will eviscerate comprehensive state water regulatory schemes.

In place of the comprehensive balancing of interests possible in state water systems, the Ninth Circuit imposes a regulatory-proprietary dichotomy, suggesting that section 27 merely provides for compensation to vested interests. This dichotomy is untenable, since it ignores the fact that under most state laws the validity of each vested use is decided using a number of factors that are regulatory in nature. For example, in most prior appropriation states there are statutory provisions specifically requiring the state to consider public interest criteria in the permitting process. *See, e.g.*, Alaska Stat. § 46.15.080 (1987); Idaho Code § 42-203(A)(5)(e) (Supp. 1989); Wash. Rev. Code § 90.54.020(3)(A) and (9) (1988).

By basing water allocation decisions on regulatory factors such as public interest criteria, state water systems directly influence community development and environmental protection. Although such determinations may

ultimately have some import at the national level, they are infinitely more important to the citizens of the state where they occur. They shape the priorities for water use between farmers, cities, industries, environmental demands and public interest concerns. Such determinations involve a delicate and complex balancing of benefits and costs associated with each competing use of water.

Under the Ninth Circuit's decision, private hydropower developers would not be required to comply with these regulatory provisions of state law. The decision for all practical purposes effectively precludes any further state balancing of new water demands because the state will have no way of knowing when it makes a decision regarding a particular application to use water what private hydropower projects FERC is likely to authorize in the future on a given stream. FERC can effectively undo a state's careful balancing of competing water uses by the issuance of a single hydropower license. The only remedy under the decision is to seek monetary compensation. Compensation, however, cannot restore the balance struck by the state.

The Ninth Circuit's decision also undermines individual state-created water rights. Although many think that hydropower facilities merely rely on the natural flow of the river, quite the opposite is true. Hydropower projects typically are the largest water user on a stream. Their operation affects water use and allocation in three distinct ways. First, hydropower facilities often store water for release at times of peak power demand. Second, some hydropower facilities divert most, if not all, of the water from a stream into the pen-stocks, thus dewatering a stretch of a stream. Third, the operation of a hydropower facility causes rapid fluctuations in the flow of the

river. Each of these effects has a dramatic impact upon existing and future water uses.

Under the Ninth Circuit decision, individuals have no way of knowing whether the operation of a facility will dewater their headgates or otherwise interfere with their water rights. The state cannot account for these impacts if it has no regulatory authority over the water rights for private hydropower projects. Likewise, FERC cannot account for these effects because it is not a party to the state water licensing process.

Further, limiting section 27 to protection of proprietary rights is certain to lead to a parade of litigation. As noted above, the operation of a hydropower project in large part dictates the amount of water available to other water users at any particular time, creating a likelihood of both permanent and temporary takings. Quantification of damages will be time consuming, difficult and expensive.

As the Supreme Court noted in *California v. United States*, "legal confusion . . . would arise if federal water law and state water law reigned side by side in the same locality." 438 U.S. at 669. The Ninth Circuit decision, if allowed to stand, will create this very situation. There will be two bodies of water law operating side by side, neither one of which will provide any comprehensive planning for the use of finite water supplies or any assurance to a water user that he has an enforceable right to divert water. As a matter of public policy, this result should not be sanctioned; thus, the Supreme Court should grant the writ of certiorari to decide the important federal question raised by the Ninth Circuit decision.

CONCLUSION

The Ninth Circuit's decision that the FPA exempts hydropower projects from state water laws applicable to other water users ignores the express language and legislative history of section 27 of the FPA. Further, the decision disregards established principles of federalism. The practical effect of the Ninth Circuit's decision, if allowed to stand, will be a reversal of 200 years of federal deference to state regulation of water resources. Such a profound change in policy should be reviewed by this Court. Thus, the petition for writ of certiorari should be granted.

Respectfully submitted this 6th day of November, 1989.

JIM JONES
Attorney General
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources
Division